IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

WP(C).No. 9725 of 2007(G)

OA.241/1998 of DEBT RECOVERY TRIBUNAL, ERNAKULAM

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PETITIONER:

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1. A.N.BHAT, SON OF LATE NARAYANA BHAT,
   VIII/524, T.D.SOUTH EAST STREET, KOCHI- 682 002.

2. ANITHA A. BHAT, W/O A.N.BHAT,
   CC.NO.VIII/761, SOUTH CHERLAIL KOCHI 68 002.

3. N.N.BHAT, SON OF NARAYANA BHAT,
   VIII/524, T.D. SOUTH EAST STREET, KOCHI 682 002.

BY ADV. SRI.P.R.VENKETESH
SRI.ZAKEER HUSSAIN

RESPONDENTS:

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1. ANUGRAHA CHARITABLE TRUST,
   CHITTOOR ROAD, ERNAKULAM 18, REPRESENTED BY ITS
   SECRETARY, R.GOPINATHA NAIK.

2. THE RECOVERY OFFICER, DEBT RECOVERY
   TRIBUNAL, OFFICE OF THE RECOVERY OFFICER,
   8TH FLOOR, K.S.H.B. BUILDING, PANAMPILLY NAGAR.

3. INDIAN BANK, BRANCH OFFICE,
   W.ISLAND, KOCHI- 682 003.

BY ADV. SRI.R.D.SHENOY (SR.)
SMT.R.RANJINI
SRI.S.EASWARAN
SRI.R.LAKSHMI NARAYAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXTS:

EXT.P1- TRUE COPY OF THE ORDER OF THE DEBT RECOVERY TRIBUNAL IN O.A.241 OF 1998 DATED 23-6-2000.

EXT.P2- TRUE COPY OF THE SALE PROCLAMATION ALONGWITH CONDITIONS OF SALE PROPOSING SALE OF THE PROPERTY ON 10-6-2003.

EXT.P3- TRUE COPY OF THE AFFIDAVIT FILED TO THE PETITION IN IA 30 OF 2004 SEEKING TO SET ASIDE THE SALE.

EXT.P4- TRUE COPY OF THE JUDGMENT DATED 10-3-2004 IN WPC 6298 OF 2004.

EXT.P5- TRUE COPY OF THE COMMON ORDER DATED 29-4-2004 PASSED IN IA 30 AND 31 OF 2004.

EXT.P6- TRUE COPY OF THE ORDER DATED 20-8-2004 IN IA 1842 OF 2004 IN APPEAL NO.14 OF 2004.

EXT.P7- TRUE COPY OF THE ORDER DATED 4-2-2005 IN IA 2022 OF 2004 IN APPEAL NO.14 OF 2004 BY DEBT RECOVERY TRIBUNAL.

EXT.P8- TRUE COPY OF THE REPRESENTATION ADDRESSED TO THE FIRST PETITIONER TO THE CHIEF MANAGER, INDIAN BANK, WILLINGDON ISLAND BRANCH DATED 21-8-2004.

EXT.P9- TRUE COPY OF THE ORDER DATED 4-2-2005 IN APPEAL NO.14 OF 2004 BY THE DEBT RECOVERY TRIBUNAL.

EXT.P10- TRUE COPY OF THE JUDGMENT IN MA NO.14 OF 2005 PASSED BY DEBT RECOVERY APPELLATE TRIBUNAL DATED 12-4-2006.

EXT.P11- TRUE COPY OF THE ORDER IN SLP(C) NO. PC 2100 OF 2007.

EXT.P12- TRUE COPY OF THE JUDGMENT DATED 25-1-2007 IN WP(C) NO.33771 OF 2006 OF THIS HONOURABLE COURT.

EXT.P13- TRUE COPY OF THE JUDGMENT DATED 12-3-2007 IN WA 597 OF 2007 OF THIS HONOURABLE COURT.

EXT.P14- TRUE COPY OF THE ORDER DATED 21-2-2007 OF THE RECOVERY OFFICER.

Thottathil B. Radhakrishnan, J.

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W.P.(C)No.9725 of 2007

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Dated this the 29th day of November, 2007.

JUDGMENT

'CR'

Petitioners were among the debtors in a proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, hereinafter referred to as the "RDB Act", for short, that led to Ext.P1 order dated 23-6-2000 ordering issuance of recovery certificate in the terms, inter-alia, that the debt be realized from the defendants and by sale of the properties scheduled in the original application; that the schedule to the original application be the schedule to the recovery certificate; that in case the sale proceeds of the properties scheduled in the original application is inadequate to satisfy the debt, such other amounts be realized from the defendants and their all other assets and that if needed, the defendants 2 & 4 be proceeded against

their person and be arrested and detained, as per rules. That recovery order and consequential certificate became final.

2. Thereafter, the recovery officer proceeded with sale in the course of recovery and issued a proclamation. Petitioners did not object to that proclamation, though represented by counsel. Pending such proceedings, petitioners made different representations to the superior authorities in the Bank seeking waiver or settlement of the outstandings. That did not fructify since the petitioners apparently stood by their terms. In spite of different adjournments, the sale did not take place for want of bidders. A fresh proclamation was issued reducing the upset price. Thereafter, the property was purchased by the first respondent, a charitable trust, which was the sole participant in the auction. Petitioners filed applications to set aside the sale. Those

applications were dismissed by the recovery officer. In appeals before them, that was affirmed by the Debts Recovery Tribunal and by the Appellate Tribunal.

3. Petitioners filed a Special Leave Petition before the Apex Court, but sought leave to withdraw that petition leading to the dismissal of the Special Leave Petition as withdrawn.

4. While the Special Leave Petition was pending before the Apex Court, the auction purchaser, the first respondent, moved this Court for a direction to the recovery officer to effect delivery on the basis of the sale and this Court issued Ext.P12 judgment directing the recovery officer to complete the proceedings to put the first respondent herein in possession of the property, as expeditiously as possible, within an outer limit of three months. It was, however,

clarified that the said direction will not affect any orders passed by the competent courts concerning the subject-matter and that those directions would be subject to such orders. By the time the petitioners carried an appeal against that judgment to the Division Bench, the Special Leave Petition stood dismissed as withdrawn and the petitioners, going by Ext.P13, attempted to persuade the Division Bench with their arguments, on the merits of their case, as against the sale. The Division Bench, by Ext.P13 judgment, affirmed Ext.P12 judgment, also stating that in view of the dismissal of the SLP as withdrawn, Ext.P12 judgment is perfectly right. It was also observed by the Division Bench that it will be too late for the petitioners herein to raise all their contentions before the Division Bench in Ext.P13 appeal when SLP was dismissed by the Apex Court as withdrawn.

5. A week after Ext.P13 judgment, this writ

petition was filed invoking authority of this Court under Articles 226 and 227 of the Constitution, challenging the decisions of the Appellate Tribunal, the Debts Recovery Tribunal and the Recovery Officer.

6. According to the petitioners, the proclamation was not in the language of the District where the property is situate and therefore Rule 52(2) of the Second Schedule of the Income Tax Act, 1961, hereinafter referred to as the "Schedule Rules", has been violated. They also contend that though every adjournment of the sale was within one month of the previous date of posting, the net effect of the adjournments was for a few months at a stretch and therefore it should be deemed that the sale was adjourned beyond one month.

7. I may notice that in Ext.P3 affidavit and

application to set aside the sale, the thrust of the contentions was that the petitioners repeatedly requested the Bank to settle the transaction and that the property was sold for an amount much below its real price. Barring that, it is clearly evident from Ext.P3 that the petitioners were aware of every adjournment. As already noticed, the petitioners had not objected to the proclamations. They had suggested upset price from their side. Even regarding the format of proceedings, there was no objection at that point of time.

8. It is also urged in this writ petition that there was no attachment effected by the recovery officer as a prelude to sale and therefore the impugned sale is without the sanction of law. It is further contended that the property could have been sold in lots rather than as a single piece.

9. In opposition to this writ petition, the learned senior counsel appearing for the first respondent and the learned counsel for the Bank argued that Ext.P11 order of the Apex Court, whereby the writ petitioners withdrew the SLP, has to be treated as a seal of finality and the Appellate Tribunal's order is not open to further orders of this Court either under Articles 226 or 227 of the Constitution and still further, that the legal effect of Ext.P11 order of the Apex Court as urged by the respondents herein has found the approval of the Division Bench of this Court in Ext.P13 judgment. It is also contended that there was no violation of the relevant Rules and that there was no material irregularity in conducting the sale.

10. On to the question of maintainability of the writ petition, it has to be noticed that by

Ext.P12 judgment, this Court directed completion of the proceedings, to put the auction purchaser in possession, as expeditiously as possible, with the clarification that the said judgment will not affect any orders passed by the competent courts concerning the subject-matter and still further, that the directions contained in that judgment will be subject to such orders. Obviously therefore, any litigation regarding the correctness or otherwise of the verdict of the Appellate Tribunal was not impeded. It was after that judgment was delivered on 25-1-2007, that Ext.P11 order was issued by the Apex Court on 8-3-2007 dismissing the SLP as withdrawn at the request of the petitioners. When Ext.P13 judgment was delivered at the stage of admission, four days after the issuance of Ext.P11 order of the Apex Court, the Division Bench had only concluded that Ext.P12 judgment of the learned single Judge did not call for any inference in exercise of authority under Section 5 of the Kerala

High Court Act. The observation in that judgment that it would be too late for the appellants to raise all their contentions was obviously only in relation to the writ appeal that was filed against Ext.P12 judgment, which contained the clear clarificatory direction that the orders in Ext.P12 judgment would be subservient to such orders as may be issued by any competent courts in relation to the subject-matter. So much so, I do not think that it would be justifiable to push down the petitioners on any principle referable to res judicata or such other measures and fix the finality on Exts.P11, P12 and P13 judgments. Incidentally, it was also argued as to what would be the effect of Ext.P11 order of the Apex Court. It was pointed out with reference to different decisions of the Apex Court that the order refusing leave to appeal under Article 136 of the Constitution does not result in the merger of the order appealed against. It was also pointed out

that withdrawing the matter from a Court does not invite a finality in a manner that it precludes all further procedures. A classic decision in the realm of withdrawal of proceedings is that of the Apex Court in **Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior (AIR 1987 SC 88)** wherein it was laid down that the principle emanating out of Order XXIII Rule 1 of the Code of Civil Procedure is one founded on public policy and requires to be applied even to the realm of writ petitions, except of course those concerning personal liberty and other rights emanating out of Article 21 of the Constitution. In the case in hand, the RDB Act does not provide for an appeal against the decision of the Appellate Tribunal to the Supreme Court. Writ petitions are therefore entertained in exercise of authority under Articles 226 and 227 of the Constitution by the High Court in cases where it is found that the exercise of

such authority is needed. The withdrawal of the SLP as per Ext.P11 order cannot be treated, on the facts and in the circumstances of the case, as a situation of abandonment of rights to litigate against the decision of the Appellate Tribunal because of the nature of the questions involved in this matter and the value of property that is the subject-matter of the litigation. Under such circumstances, I am inclined to treat that the withdrawal of the SLP before the Apex Court, though with no leave to institute appropriate proceedings, was not with the conscious abandonment of any right to sue, that would be available to the petitioners in terms of Articles 226 and 227 of the Constitution, before this Court against the verdict of the Appellate Tribunal. Therefore, I am inclined to proceed into the merits of the case.

11. As already noticed, no objections were

filed to the proclamations. The proclamations were in English language which is stated to be not the language of Ernakulam District, where the property is situate. That defect, could have an impact during the course of adjudication of an application to set aside sale, if at all, only if such a defect has resulted in a material irregularity. Petitioners, as already noticed, were parties to the proceedings and were represented through counsel before the recovery officer. No such objection having been raised, the contention based on Rule 52(2) of the Schedule Rules is unsustainable. The same is accordingly rejected. The relevant rule among the Schedule Rules only provides that there shall be a fresh proclamation if the sale is adjourned for a period beyond one month. Rule 15(1) of the Schedule Rules provides a discretion with the recovery officer to adjourn the sale to a specified day and also the power to adjourn an adjourned sale. Sub rule 2 of Rule 15

provides that where a sale of immovable property is adjourned for a period longer than a calendar month, a fresh proclamation of sale under the Schedule Rules shall be made unless the defaulter consents to waive it. Therefore, a fresh proclamation is called for only when an adjournment of a sale is made for a period longer than one calendar month. When sub-rule 1 of Rule 15 provides for adjournment of sale and for a further adjournment of the adjourned sale, each such adjournment would be the criteria for considering whether there should be a fresh proclamation in terms of sub-rule 2 of Rule 15. Even such a proclamation is unnecessary when the defaulter consents to waive it. The provision for a fresh proclamation is applicable only when there is a single adjournment which pushes the date of sale beyond a period of one month at one stretch. That argument on behalf of the petitioners also therefore fails.

12. Now, the pivotal question that has been argued is as to whether there should be an attachment as a prelude to sale in the case of the debt in question, which is admittedly a secured debt. Going by undisputed facts, the petitioners had mortgaged an item of property to the creditor Bank by depositing title deeds in a notified area and thereby created a simple mortgage by such deposit, in terms of the Transfer of Property Act, 1882, the "TP Act", for short. The quality of a mortgage that is created under Section 96 of the TP Act is that of a simple mortgage because by such deposit of title deeds, there is a transfer of an interest under Section 58(a) of the TP Act in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. Section 2(g)

of the RDB Act defines a debt to mean, among other things, any liability which is secured. Section 17 (1) of that Act provides that the Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions. Section 19 provides the procedure of Tribunals. Sub-section 20 thereof provides that the Tribunal may, after giving the applicant and the defendant an opportunity of being heard, pass such interim or final order on the application as it thinks fit, to meet the ends of justice. Section 22 provides for issuance of a certificate to the recovery officer for the recovery of the amount of debt specified in the certificate. Section 25 provides modes of recovery of debts which include, among other things, attachment and sale of the immovable property of the defendant. Section 29 provides

that the provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and Rules referred to the amount of debts due under the Act instead of to the Income-tax. I may also notice that Section 34(1) of the Act provides that subject to prescriptions in sub-section 2 thereof, the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the Act. Sub-section 2 of Section 34 provides that the RDB Act shall be in addition to and not in derogation of the Industrial Finance Corporation Act, 1948, the State Financial Corporations Act, 1951, the Unit Trust of India Act, 1963, the Industrial Reconstruction Bank of India Act, 1984,

the Sick Industrial Companies (Special Provisions) Act, 1985 and the Small Industries Development Bank of India Act, 1989.

13. Before proceeding further, it needs to be immediately recalled that the preamble of the RDB Act enshrines that it is an Act to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions. The statement of objects and reasons for that enactment is that banks and financial institutions found it extremely difficult in recovering loans and enforcing securities charged with them. This resulted in huge unproductive assets, the value of which deteriorates with the passage of time. The existing procedure for recovery of debts due to banks and financial institutions was found to be wholly insufficient and it was necessary that Special Tribunals with special powers for

adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector reforms were called for. It was thus that the RDB Act came into force.

14. In terms of the RDB Act, any provision of the TP Act, if inconsistent with the provisions of the RDB Act, would not continue to run against the banks. The mortgage creates a right of immovable property. That salable interest is what the bank or the financial institution has. In terms of the TP Act, that right can be enforced only through a Court. By the exclusion of the jurisdiction of the civil court and the exclusive empowerment of the Tribunal, the intention was to expedite the recovery and not to put a further spoke in the wheel. When the bank moves the Tribunal on the strength of a mortgage in its favour, the sweep of sub-section 1 of Section 17(1), which empowers the Tribunal to pass such orders as may be necessary in

the ends of justice, confers sufficient authority on the Tribunal to pass an order for sale. That power is inherent and unbridled by any provisions of any of the law for the time being in force. This is the net effect of Section 34(1) of the RDB Act. On this short reason, the argument of the petitioners on this ground also fails. That apart, Ext.P1 recovery order, which has become final, as quoted above, contains clear terms by which the mode of recovery is regulated by the Tribunal, which procedure can also stand within the sweep of jurisdiction available under Section 17(1) to pass such orders as are necessary to secure the ends of justice. The purposive manner in which the construction of the legislation requires to be done advises me to hold unless there is any express inhibition which would result in showing a different course to be the ends of justice. The Tribunal has very wide powers in terms of Section 17(1), including the power to order sale and such

an order would run without any requirement to make an order of attachment.

15. It has also to be noticed that the provision in Section 29 of the Act is not one by which the recovery certificate under that Act would metamorphose, to be deemed to be a recovery certificate under the Income-tax Act. All that Section 29 of the RDB Act does, is to give the freedom to use provisions which are available in the Second and Third Schedules of the Income Tax Act as far as may be and as far as they may apply to the situation in hand, that too, with necessary modifications. This gives a fair amount of freedom to the Tribunal to reach at its goal which is to pass an order, as it thinks fit, to meet the ends of justice.

16. Petitioners' contention that the proclamation was not in Form 13 of the IT Rules of

the Schedule also does not stand because the petitioners had never raised such an objection to the proclamation though they had participated in the proceedings.

17. The Tribunal in dismissing one of the appeals of the petitioners also took the view that the petitioners were bound by the terms of proviso (b) to Rule 61 of the Second Schedule of the IT Act. The said provision enjoins that an application to set aside sale shall not be allowed unless the applicant deposits the amount covered by the recovery certificate. The harshness of that rule or the question whether it is arbitrary and hence unconstitutional is not a matter to be gone into in this writ petition where the validity of those rules is not under challenge. That question is therefore left open. Even if I were to answer the question in favour of the petitioners, that would not, by itself, improve the case. On the

other ground, as already found, the sale, as confirmed by the Tribunal and the Appellate Tribunal, does not warrant interference by this Court in exercise of power under Articles 226 or 227 of the Constitution of India.

For the aforesaid reasons, this writ petition fails. It is hence dismissed.

Thottathil B.Radhakrishnan,
Judge.

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